No. (1)

Supreme Court, U.S.
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In The

Supreme Court of The United States

October Term, 1995

DAVID HARGETT,

Petitioner,

- against -

NATIONAL WESTMINSTER BANK, USA,
Gordon Oliosi and Roger Goldman,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. In an employment discrimination action brought pursuant to 42 U.S.C. § 1981, is proof that other employees who committed the same offense for which the petitioner was terminated, were not terminated, sufficient to prove that respondents' stated reason for terminating petitioner was pretextual, without regard to the employment positions held by the various employees?

II. Whether the lower courts abused their discretion in ruling that no *Price Waterhouse* "mixed motives" charge was required, in light of the fact that petitioner showed that a mixed motives charge was proper, in accord with this Court's ruling in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), by submitting evidence to show that his termination was "the product of a mixture of legitimate and illegitimate motives" ? *Price Waterhouse*, 490 U.S. at 247.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. The parent company of respondent National Westminster Bank USA is, upon information and belief, National Westminster Bank, p.l.c., an English corporation; upon information and belief, all subsidiaries of respondent National Westminster Bank USA are wholly owned.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF CITATIONS iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT

POINT I

THE COURT SHOULD GRANT THE WRIT, DUE TO A SPLIT IN THE FEDERAL CIRCUIT COURTS OVER THE MEANING OF "SIMILARLY SITUATED" IN EMPLOYMENT DISCRIMINATION CASES . . . 11

POINT II

THE COURT SHOULD GRANT THE WRIT, DUE TO THE CONFLICT OF THE CIRCUIT COURT'S RULING ON "MIXED MOTIVES" WITH RELEVANT DECISIONS OF THIS COURT 21

CONCLUSION 25

TABLE OF CITATIONS
CASES

Boner v. Board of Commissioners of the Little Rock Municipal Water Works, 674 F.2d 693 (8th Cir. 1982) . 14

Hargett v. National Westminster Bank, USA, 78 F.3d 836 (2d Cir. 1996) 1,12,18,21

Harvey v. Anheuser-Busch, Inc., 38 F.3d 968 (8th Cir. 1994) . . . 13,14

Henry v. Daytop Village, Inc., 42 F.3d 89 (2d Cir. 1994) . . . 15,16,21

Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981) . 17,19,20

Kirschner v. Office of the Comptroller of the City of New York, 973 F.2d 88 (2d Cir. 1992) 21

Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1980) 23

Mazzella v. RCA Global Communications, Inc., 642 F.Supp. 1531 (S.D.N.Y. 1986), *aff'd without opinion*, 814 F.2d 653 (2nd Cir. 1987) 16,17,19,20,21

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (1976) 13, 15, 20, 21

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) 12, 13, 15, 20, 21, 23

Ostrowski v. Atlantic Mutual Insurance Co., 968 F.2d 171 (2d Cir. 1992) 21,22,23

Pierce v. Commonwealth Life Insurance Co., 40 F.3d 796 (6th Cir. 1994) . . . 14, 15

Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) 10,21,25

Radabaugh v. Zip Feed Mills, Inc., 997 F.2d 444 (8th Cir. 1993) 21

Rohde v. K.O. Steel Castings, Inc., 649 F.2d 317 (5th Cir. 1981) 14

Talley v. United States Postal Service, 720 F.2d 505 (8th Cir. 1983), *cert. denied*, 446 U.S. 952 (1984) . 17,18,19,20

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L. Ed. 2d 207 (1981) 12

Tyler v. Bethlehem Steel Corp., 958 F.2d 1176 (2d Cir. 1992) 22

STATUTES

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1981 2

New York State Executive Law § 296 . 2

APPENDIX

Appendix A - Opinion of the United States Court of Appeals for the Second Circuit Dated March 19, 1996 . . . . . 1a

Appendix B - Memorandum Order of the United States District Court for the Southern District of New York Filed February 10, 1995 . . . . . 16a

Appendix C - Excerpts of Memorandum Order of the United States District Court for the Southern District of New York in *Henry v. Daytop Village, Inc.*, 91 CIV 4488, Dated January 7, 1994 (Glasser, J.) 17a

No.

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DAVID HARGETT,

Petitioner,

vs.

NATIONAL WESTMINSTER BANK, USA,
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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, David T. Hargett, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 78 F.3d 836 and is

reproduced in the Appendix filed herewith ("App.") at 1a. The unreported opinion of the district court in this case is reproduced at 16a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on March 19, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This action was brought pursuant to 42 U.S.C. § 1981, which is set forth below:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

This action was also brought pursuant to New York's Executive Law § 296(1)(a), which is set forth below:

> It shall be unlawful discriminatory practice for an employer or licensing agency, because of the age, race, creed,

color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

STATEMENT OF THE CASE

Petitioner David T. Hargett was a 10-year career employee of Citicorp, N.A. (a federally chartered bank) who had a stellar reputation, work history, and promotion record, when respondents began to recruit him for a position around September, 1991. During the course of the recruitment, Mr. Hargett, who is African-American and thus a member of a protected minority class, interviewed with respondent Goldman directly (R. 90). During the course of the interview, Mr. Hargett expressed his concern over the lack of minorities employed by respondent NatWest (R. 92). In response, Goldman stated that "this company is very vanilla" and that "you may experience some unfair treatment based on your race." (R. 92). Goldman promised Mr. Hargett that he would be able to do his job and that there would be no adverse impact "in case of any unfair treatment based on race." (R. 92). Mr. Hargett was "delighted" with respondent Goldman's promise (R. 93), and the recruitment was ultimately successful. (R. 97). Mr. Hargett was hired by respondents on or about November 13, 1991, in the position of Vice-President, Area Business Director, at an annual salary of

$95,000. (R. 97). Mr. Hargett reported to respondent Oliosi, and performed at a uniformly high and exemplary level throughout his employment. (R. 759-60, 789).

In late January, 1992, a group of employees approached Mr. Hargett and sought permission to have a celebration for a co-worker, Paul McConnie, and to bring in a stripper for the event. (R. 116-17). Mr. Hargett told the employees that "we couldn't have a stripper in the branch. That was inappropriate" (R. 119), and that "there could be no nudity." (R. 119). Mr. Hargett followed up on this request on January 30, 1992, by writing a request to respondent Oliosi "to have a woman coming in wearing a bathing suit to serve cake at our next meeting." (R. 119). Respondent Oliosi approved the request made by Mr. Hargett (R. 119), and the fact of Oliosi's approval of the note and knowledge that a woman in a bathing suit would perform was acknowledged by Ms. Barbara Hahn, a senior vice-president for human resources at appellee Bank. (R. 563-68).

Before the event, which was held on February 11, 1992, occurred, Mr. Hargett instructed Mr. George Stylianou, the employee who had requested to have a dancer present, to contact every person who was to be at the meeting and inform them that a dancer would be present, and that if anyone objected, "we could not have this dancer come in at our next meeting." (R. 120). Mr. Stylianou later informed Mr. Hargett that he had contacted every person and no one had objected to the dancer. (R. 122). At a break in the

meeting on February 11, 1992, where people were free to leave (R. 615, 704-05), the dancer came in after business hours (R. 121-22, 224), stripped down to "an aerobic gym type uniform" (R. 124), and sang happy birthday to Mr. McConnie. (R. 124). There was "no nudity, no G-string" (R. 124), and the entire event lasted about ten minutes. (R. 124).

On or about April 1, 1992, some 51 days after the meeting of February 11, 1992, Mr. Hargett was informed by respondent Oliosi that "senior management had gotten wind" of the event (R. 145-6). Oliosi told Mr. Hargett to "keep a low profile" and that he did not need to be concerned. (R. 146-7). On the following day, April 2, 1996, Mr. Hargett participated in an executive visit of the Chairman of the Board of respondent NatWest's parent company, National Westminster, p.l.c. (R. 147). This visit took place at a branch under Mr. Hargett's responsibility, and he was complimented by Oliosi on the success of the visit. (R. 147).

On April 6, 1992, Mr. Hargett was contacted by respondent Oliosi and told to come to his office, where Oliosi and Hahn were waiting for him when he arrived. (R. 154). Oliosi stated that an anonymous letter had been received and asked Mr. Hargett "to resign from the bank because I hired a stripper." (R. 154). Ms. Hahn allegedly received an anonymous document on April 2, 1992, complaining of Mr. Hargett allowing a "prostitute to strip to the bare bone because it was Paul McConnie's birthday." (R. 461-62). Ms. Hahn never sought to determine the origins

of the note; however, Mr. Hargett informed her that the dancer had stripped down to a bathing suit at the event. (R. 465, 470). Mr. Hargett protested that resignation would be improper, that Oliosi himself had approved the event, and demanded to speak with respondent Goldman. (R. 156-58). Oliosi refused to allow Mr. Hargett to speak to Goldman, claiming that he "had no right" to do so, and instructed Mr. Hargett "to leave the premises immediately." (R. 158). Mr. Hargett then went back to his office, where he found that all of his "personal effects were gone" - his desk, his credenza, his family portraits, confidential information, performance appraisals, his Rolodex - "everything had been totally removed from the premise." (R. 158-59). Mr. Hargett has never been able to retrieve any of these property items. (R. 165).

Several days later, Mr. Hargett met with respondent Goldman at a cafeteria at the Hyatt Hotel on 42nd Street in Manhattan. (R. 178-79). Mr. Hargett told Goldman that he had been unfairly treated and told him of similar incidents where dancers had come in and stripped on bank premises, and where the employees involved were not terminated. (R. 179). Goldman did not respond except to scribble on a napkin (R. 179), and no action was taken to reinstate Mr. Hargett, even with respondents having knowledge of these similar incidents. Thus, Mr. Hargett was terminated, wrongly, by respondents, on April 6, 1992.

At trial, there was no question that Mr. Hargett, as an African-American, is a member of a protected class, and that he

was qualified for his position and performed it in an exemplary and outstanding fashion. (R. 759-60, 789). There was also no question that, after Mr. Hargett's wrongful termination, he was replaced by two white individuals who assumed his duties. (R. 791).

Respondents offered three different reasons for Mr. Hargett's termination. Ms. Barbara Hahn, a senior vice-president for human resources at appellee Bank, testified that she received an anonymous document on April 2, 1992, complaining of Mr. Hargett allowing a "prostitute to strip to the bare bone because it was Paul McConnie's birthday." (R. 461-62). Ms. Hahn never sought to determine the origins of the note; however, she and Mr. Oliosi questioned Mr. Hargett, who told her that the female had stripped down to a bathing suit at Paul McConnie party and anniversary. (R. 465, 470). Ms. Hahn testified that she "made the recommendation" to terminate Mr. Hargett and that "[t]he decision to terminate him had to do with the striptease artist attending a bank meeting and he allowed that to happen." (R. 476-77). Respondent Oliosi testified that Mr. Hargett was terminated because of "the fact that he would allow a dancer, a stripper or whatever to do that at a meeting in a branch." (R. 864). Finally, respondent Goldman testified that Mr. Hargett was terminated because "after satisfying myself that David sat there while a woman took off some of her clothes, I couldn't look any woman who worked for the bank in the eye if I let David stay employed." (R. 906). Thus, three reasons were given for Mr. Hargett's termination: (i) he

allowed a "striptease artist" to perform at a bank meeting (Hahn); (ii) he allowed a stripper to perform at a meeting in a branch (respondent Oliosi); and (iii) he sat there while a woman removed some of her clothes (respondent Goldman).

These reasons were rebutted by evidence of two similar incidents, in which dancers stripped on bank premises, and in which, contrary to the termination of Mr. Hargett, the only punishment ever meted out was a verbal warning. These reasons were also rebutted by the fact that Ms. Hahn knew that respondent Oliosi had approved of the event held on February 11, 1992, (R. 119, 563-68), but she failed to terminate Oliosi for allowing a "striptease artist" to perform at a bank meeting.

Mr. Robert Bischer, a white employee who, at the time of trial, was employed by respondent Bank as "an assistant vice president in the business and professional credit service area" (R. 310) (a position comparable in hierarchy to Mr. Hargett's), testified as to a celebration for him as a branch manager in late March, 1990, at respondent Bank's branch located at 111 Broadway, New York, New York. Mr. Bischer testified that "a stripper, exotic dancer came into the office at approximately 4:30" and that she stripped down to "her bra and panties" while on the premises. (R. 312-314). With several employees present, including "nine or ten women", the stripper engaged in a "belly dance" to music played by a boom box she had brought with her. (R. 312-314). Mr. Bischer acknowledged that no one, including himself, was ever disciplined in any way

for allowing this stripper to come onto bank premises during bank hours and strip to her bra and panties in front of several bank employees, including nine or ten women. (R. 312-314).

Ms. Anne St. Paul, who is white, was, at least up to the time of trial, an assistant vice president and branch manager with respondent Bank. Ms. St. Paul testified that in September, 1991, a time when her direct supervisor was respondent Oliosi, she allowed a male stripper to come into the branch to celebrate an employee's 30th birthday (R. 358-359). In fact, Ms. St. Paul testified that she organized the event, paid for it, and allowed non-bank employees to be present at the event (R. 355-370). Ms. St. Paul testified that the male stripper came into the bank, played music, took his clothes off, and stripped down to his bathing suit, performing a "striptease" as characterized by Ms. St. Paul. (R. 366-368). The bathing suit "started at his waist and ended at the top of his legs." (R. 366-68, 377). Ms. St. Paul testified that she was given a verbal warning only as to this event; she was not put on probation or suspended, was not demoted, she never lost pay, and, in contrast to Mr. Hargett, she certainly was never terminated. (R. 373, 378-79). Thus, Ms. St. Paul, who allowed a stripper on bank premises during bank hours (and who reported to respondent Oliosi just as Mr. Hargett did), received nothing more than a verbal warning.

At the trial of this matter in the United States District Court for the Southern District, Judge Dominick DiCarlo,

a Court of International Trade judge who presided at trial, allowed the jury to consider, over petitioner's objections, the positions that each of these individuals held with respondent bank in determining whether such individuals were similarly situated to Mr. Hargett for the purposes of determining whether respondents' stated reasons for terminating Mr. Hargett were pretextual. (R. 978, 1118-19). Judge DiCarlo also refused to allow petitioner a *Price Waterhouse* mixed-motives charge. (R. 970-71).

On February 8, 1995, the jury returned a verdict of no liability, after finding, under the disparate treatment analysis, that petitioner had made out a prima facie case of employment discrimination, that respondents had offered a non-discriminatory reason for petitioner's termination, but that petitioner had not proved, by a preponderance of the evidence, that respondents' stated reason was pretextual. This judgment was effectuated by the Court in a judgment, dated February 10, 1995, ordering that, pursuant to the jury verdict, the complaint be dismissed. This judgment was entered by the clerk of the Court on February 14, 1995.

On appeal, the United States Court of Appeals for the Second Circuit affirmed the trial verdict, finding that Judge DiCarlo did not abuse his discretion in (i) allowing consideration of employee position in determining whether Mr. Hargett was "similarly situated" to other employees, and (ii) denying petitioner's request for a *Price Waterhouse* mixed motives charge.

POINT I

THE COURT SHOULD GRANT THE WRIT, DUE TO A SPLIT IN THE FEDERAL CIRCUIT COURTS OVER THE MEANING OF "SIMILARLY SITUATED" IN EMPLOYMENT DISCRIMINATION CASES

This Court should grant the writ in order to resolve a split between the Federal Circuit Courts of Appeals on the important issue of determining when employees are "similarly situated" in proving that an employer's proffered reason for terminating (or otherwise taking action against) an employee is pretextual.

As the Second Circuit noted in its opinion, this Court has held, in an employment discrimination case, that

> [a plaintiff] has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection [or termination]. Third, should the defendant carry this burden, the plaintiff must prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

78 F.3d at 838 (App. A, 3a-4a), quoting

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981). As the Court of Appeals noted, "[Mr.] Hargett made out a prima facie case of employment discrimination." 78 F.3d at 838 (App. A, 5a). The Court of Appeals also noted, correctly, that respondents gave a nondiscriminatory reason for Mr. Hargett's termination - "namely that he had allowed a female stripper to perform at a function during business hours on National Westminster premises and that he had attended the function." 78 F.3d at 838 (App. A, 5a). Thus, the burden of proof shifted back to Mr. Hargett to prove that respondents' stated reason was pretextual.

This Court first addressed the issue of pretext in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), where this Court ruled that

> [e]specially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness . . . were nevertheless retained or rehired . . . [o]ther evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment.

McDonnell Douglas, 411 U.S. at 804-05. This Court further expounded on the issue of pretext in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976), where this Court ruled that

> as was indicated in *McDonnell Douglas*, an allegation that other "employees involved in acts against (the employer) of comparable seriousness . . . were nonetheless retained . . . " is adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for terminating him was merely a pretext.

McDonald, 427 U.S. at 283 n. 11, quoting *McDonnell Douglas*, 411 U.S. at 804. Thus, this Court has clearly stated that proof that employees, who have committed the same offense for which a claimant was allegedly terminated (i.e., "similarly situated" employees), were not terminated but treated differently, is sufficient to prove that the employer's proffered reason for the termination of the claimant is pretextual.

Some, but not all, of the Federal Circuit Courts of Appeals, have followed this Court's rulings. Thus, the Eighth Circuit Court of Appeals held, in *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968 (8th Cir. 1994), that

> [e]mployees are similarly situated when they "are involved in or accused of the same

> offense and are disciplined in different ways."

Harvey, 38 F.3d at 971, quoting *Boner v. Board of Commissioners of the Little Rock Municipal Water Works*, 674 F.2d 693, 697 (8th Cir. 1982). The *Boner* Court ruled that

> [w]hat is relevant (in determining whether employees are similarly situated) is that two employees are involved in or accused of the same offense and are disciplined in different ways.

Boner, 674 F.2d at 697, quoting *Rohde v. K.O. Steel Castings, Inc.*, 649 F.2d 317, 322 (5th Cir. 1981).

Other Circuit Courts have not applied this Court's rulings on this issue uniformly. In *Pierce v. Commonwealth Life Insurance Co.*, 40 F.3d 796 (6th Cir. 1994), the plaintiff, a supervisor who was demoted for violating the employer's sexual harassment policy, was able to point to another (non-supervisory) employee who had committed the same offense and was not demoted. The Sixth Circuit held that employment position was relevant based on the employer's potential liability under Title VII for the illegal acts of a supervisor (strict liability) and a non-supervisor (employer liable only if it knew or should have known of such acts):

> [t]hus, unlike the case of supervisor Pierce, the company would have the opportunity to

> assess and remedy any sexual harassment complaints lodged against non-supervisor Kennedy before incurring liability.

Pierce, 40 F.2d at 804. Thus, the Sixth Circuit based its ruling not solely on the "acts . . . of comparable seriousness", *McDonald*, 427 U.S. at 283 n. 11, quoting *McDonnell Douglas*, 411 U.S. at 804, but also on an unprecedented consideration of the standard of proof required with respect to liability. Thus, *Pierce* represents an erroneous "similarly situated" analysis based on impermissible considerations.

The Second Circuit's decision in this case and previous cases underscores the danger of erroneous analysis, and show how the excuse of "job position" becomes, of itself, a pretext used to justify unlawful discriminatory acts. In this case, the Second Circuit agreed with respondents' argument that job position was relevant to the "similarly situated" analysis, finding that "[r]equiring higher-ups to conform to a higher standard of decency is not contrary to established law and does conform with common sense." 78 F.3d at 840. Respondents, and, as a result, the Second Circuit, relied heavily on the ruling in *Henry v. Daytop Village, Inc.*, 42 F.3d 89, 96-97 (2d Cir. 1994).

In *Henry*, the plaintiff was terminated, according to the employer, for accepting overpayments "for her husband's medical expenses." *Henry*, 42 F.3d at 92. With respect to this proffered reason for termination, the plaintiff alleged that

> ten named persons, all white, male, or both, charged by the defendant with misconduct, were allowed to remain on the payroll or resign pending the disposition of charges against them.

Henry, 42 F.3d at 94. The Second Circuit found that, "as the district court noted, Henry failed to corroborate this allegation in any way", *id.*, and simply approved of

> the district court's finding that eight of the ten enumerated employees were not, in fact, "similarly situated" to Henry -- because they either held a different occupational status, or engaged in conduct different in kind to that attributed to Henry.

Id. Thus, the Second Circuit relied on the district court's ruling, which, as will now be shown, was erroneous and based on a misinterpretation of case law.

The district court in *Henry*, see Memorandum and Order dated January 7, 1994, at 15 (App. C at 17a) adopted the holding of *Mazzella v. RCA Global Communications, Inc.*, 642 F.Supp. 1531 (S.D.N.Y. 1986), *aff'd without opinion*, 814 F.2d 653 (2nd Cir. 1987), that

> [e]mployees are not "similarly situated" merely because their conduct might be analogized.

> Rather, in order to be similarly situated, other employees must have reported to the same supervisor as the plaintiff, must have been subject to the same standards governing performance evaluation and discipline, and must have engaged in conduct similar to the plaintiff's, without such differentiating or mitigating circumstances that would distinguish their conduct or the appropriate discipline for it.

Mazzella, 642 F.Supp. at 1546-47[1], citing *Talley v. United States Postal Service*, 720 F.2d 505 (8th Cir. 1983), *cert. denied*, 446 U.S. 952 (1984).

This holding in *Mazzella* was clearly fabricated out of thin air, as the Court in *Talley* said none of those things attributed to it by the *Mazzella* court, but simply noted that the district court had

> correctly found . . . that Talley and the other employees were not similarly situated. *See Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1255 (8th Cir. 1981).

Talley, 720 F.2d at 507. Thus, the Second

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[1]In *Mazzella*, the plaintiff claimed wrongful discharge because she was pregnant; the Court noted that she failed to prove that the employer's stated reason for termination, poor performance, was pretextual. *Mazzella*, 642 F.Supp. at 1547. The Court noted that other employees were not similarly situated because they *had not committed the same offense* of poor performance; see *Mazzella*, 642 F.Supp. at 1546.

Circuit, in this case, has relied on cases, which in turn rely on cases, which do not stand for the propositions for which they are cited.

The *Talley* case, in fact, points out the danger and the absurdity of allowing employment position to be a relevant consideration in determining whether two employees are "similarly situated" in analyzing pretext. *Talley* involved a situation where the termination of "temporary casual employees" after the first time they lost their keys was found to be justified, in contrast to the fact that "career" employees were not terminated the first time they lost their keys, because

> [c]areer employees, through a corrective and progressive form of discipline, are given an opportunity to improve their performance. Casual employees, because of the short-term nature of the position, are discharged following the commission of a serious offense.

Talley, 720 F.2d at 507. That is, the employee with less responsibility and status was made *more* accountable. This holding by the *Talley* court flies in the face of the Second Circuit's holding in this case that "[r]equiring higher-ups to conform to a higher standard of decency is not contrary to established law . . . " 78 F.3d at 840 (App. A at 9a). It also shows that employment position can be used, and has been used in this case, as an excuse for unlawful discriminatory acts. For this Court to allow such

misinterpretations of its holdings, would be to allow employers to commit unlawful discriminatory acts against employees, and to be able to justify such acts by asserting that such employees were held to a higher standard of accountability than other employees because of their employment position (regardless of whether such position is a "higher up" position or a "lower down" one).[2] Indeed, an application of the *Talley* court's "similarly situated" analysis, in the instant case, would mean that petitioner, as an individual actively recruited by respondents and thus more of a "career employee" who is to be "given an opportunity to improve [his] performance, *Talley*, 720 F.2d at 507, would have retained his job, whereas Bischer and St. Paul, at the time of the offense lower-level employees, would have been terminated.

Finally, an analysis of the case cited by the *Talley* court, *Johnson*, in support of its inclusion of employment position as a consideration in the "similarly situated" analysis, shows that such inclusion was fabricated out of thin air. In *Johnson*, in response to the employer's stated reason that he was discharged for insubordination, the plaintiff "presented testimony of a white

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[2] Ironically, the *Talley* court, as did the *Mazzella* court, found that plaintiff had not been terminated until she had lost her keys a second time, and that the other employees were not similarly situated because they *had not committed the same offense* - they had not lost their keys more than once. *See Talley*, 720 F.2d at 507.

employee who, despite having sworn at . . . an assistant supervisor . . . was not discharged." *Johnson*, 646 F.2d at 1255. In reflecting on the standard to be applied in the "similarly situated" analysis, the *Johnson* court correctly followed this Court's holdings in *McDonnell Douglas* and *McDonald*:

> [f]or Johnson to prove a pretext *he must show a similarity between his conduct and that of white employees not discharged.* (citation omitted). He has failed to do so. Rusty Schaffer, the plant supervisor, heard Johnson swearing at an assistant supervisor. In the example relied on by Johnson, Rusty Schaffer did not hear the white employee swear at an assistant supervisor. The testimony showed this to be the case. Schaffer testified that the only employee, other than Johnson, he had ever heard swear at a supervisor was white. Schaffer discharged that employee. Johnson was discharged because Rusty Schaffer heard him swear at a supervisor, and not because he was black. The evidence showed that *blacks and whites engaged in similar conduct were treated identically.* (emphasis added).

Johnson, 646 F.2d at 1255-56. Thus, the *Talley* court misread *Johnson* and added an improper consideration, namely employment position, to the "similarly situated" analysis. This improper consideration was

relied upon by the *Mazzella* court, and *Mazzella* was in turn relied upon by the *Henry* court. Such an improper consideration directly contradicts the Supreme Court's holdings in *McDonnell Douglas* and *McDonald*, and requires that the petition for writ be granted.

POINT II

THE COURT SHOULD GRANT THE WRIT, AS THE CIRCUIT COURT'S RULING ON "MIXED MOTIVES" CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

The Court of Appeals upheld the lower court's ruling denying petitioner a *Price Waterhouse* "mixed motives" instruction to the jury. *See* 78 F.3d at 840-41.

This Court has held that a mixed motives charge is proper when there is evidence to show that an employment determination was "the product of a mixture of legitimate and illegitimate motives." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247, 109 S.Ct. 1775, 1788, 104 L.Ed.2d 268 (1989). According to the Second Circuit, to show that a mixed motives charge would be proper, it is sufficient to show that a decisionmaker made statements "that may be viewed as directly reflecting the alleged discriminatory attitude . . . sufficient to permit the factfinder to infer that that attitude was more likely than not a motivating factor in the employer's decision." *Ostrowski v. Atlantic Mutual Ins. Co.*, 968 F.2d 171, 182 (2d Cir. 1992); *see also Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 449 (8th Cir. 1993), *accord, Kirschner v. Office of the*

Comptroller of the City of New York, 973 F.2d 88, 93 (2d Cir. 1992).

There is no question that Mr. Hargett met his burden of showing evidence "reflecting the alleged discriminatory attitude . . . ", *Ostrowski*, 968 F.2d at 182; see also *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176 (2nd Cir. 1992). With respect to such proof, the Second Circuit has held that

> a plaintiff may prove that the forbidden animus "was a motivating factor" through the presentation of either "direct or circumstantial evidence."

Ostrowski, 968 F.2d at 181-82, quoting *Tyler*, 958 F.2d at 1185-86. If circumstantial proof is offered as proof of the forbidden animus, "that circumstantial evidence must be tied directly to the alleged discriminatory animus." *Ostrowski*, 968 F.2d at 182. Thus, in *Tyler*, which involved an age discrimination claim, the Second Circuit approved a mixed-motives charge based on the fact that

> the plaintiff had presented evidence not only that younger employees had received favorable treatment while he had not, but also that the company had an approved category of employees it called the "Young Tiger classification", and that company appraisals specifically referred to "youth in a positive manner."

Ostrowski, 968 F.2d at 182, citing *Tyler*, 958 F.2d at 1179. In *Ostrowski*, another age discrimination case, this Court held that a mixed-motives charge would be appropriate

> if the plaintiff presents evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude, and that evidence is sufficient to permit the factfinder to infer that that attitude was more likely than not a motivating factor in the employer's decision.

Ostrowski, 968 F.2d at 182. Such evidence was presented in the instant case, by the fact that respondent Goldman told Mr. Hargett that respondent NatWest was very "vanilla" and that he "may experience some unfair treatment based on your race." (R. 92). Such evidence not only reflects the discriminatory attitude of respondents, but also exists as a "general policy and practice with respect to minority employment" to show that a motivating factor in Mr. Hargett's termination was race. *McDonnell Douglas*, 411 U.S. at 804-05; *see also Lieberman v. Gant*, 630 F.2d 60, 68 (2d Cir. 1980) (noting that, in addition to other factors, "[e]vidence of general patterns of discrimination by an employer is relevant even in an individual disparate treatment case").

Additional evidence was offered at trial which showed respondents'

discriminatory attitude and general patterns of discrimination. Ms. Hahn, who testified that the investigation, recommendation of termination of Mr. Hargett, and subsequent termination, began with her receipt of any anonymous letter levelling accusations at Mr. Hargett (R. 448); however, Ms. Hahn never traced the letter or sought to discover its origins (R. 486); she never conducted an investigation of respondents Goldman or Oliosi, both of whom also stood accused in the letter (R. 524); nor did she conduct an investigation of the individual who acknowledged that he had arranged for the dancer to appear at the February 11, 1992, event. (R. 523). Ms. Hahn also failed to properly investigate an employee about whom she received a letter which accused him of sexual harassment. (R. 504). Finally, respondent Goldman, who had promised Mr. Hargett that he would not allow any unfair discriminatory practice against him to occur (R. 92), broke that promise to Mr. Hargett, failed to intervene to prevent his wrongful termination, and, after finally meeting with him days later, failed to take any action to correct the wrongful acts, even though he knew of similar incidents in which other employees were not terminated. (R. 178-80).

Ms. Hahn's *glaring* failure to investigate Mr. Bischer and Ms. St. Paul, and others involved in those incidents, and her utter failure to investigate the employee accused, in a letter which she received, of sexual harassment, in the same manner that Mr. Hargett was investigated and then terminated, raises the specter of discrimination. Respondent

Goldman's admission that Mr. Hargett might receive discriminatory treatment (R. 92), and his failure to act to prevent such treatment, when he knew that other employees had committed the same offense of which Mr. Hargett was accused, and had not been terminated, indisputably shows illegitimate motives, as required by this Court in *Price Waterhouse*. These facts, submitted at trial, are more than sufficient to meet this Court's threshold requirement for showing that a mixed motives charge is proper, and for this reason the petition for a writ should be granted.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 16, 1996
New York, New York

APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED MARCH 19, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Argued 11/21/95 Decided 3/19/96

No. 403, Docket 95-7266

DAVID T. HARGETT,
APPELLANT

v.

NATIONAL WESTMINSTER BANK, USA,
GORDON OLIOSI AND ROGER GOLDMAN,
APPELLEES

Appeal from the United States District Court for the Southern District of New York

(93 CIV 4450)

Dan Cherner argued the cause and filed the briefs for appellant.

Kenneth J. Kelly argued the cause and filed the brief for appellees.

Before CARDAMONE, WALKER, and PARKER, Circuit Judges.

WALKER, Circuit Judge:

Plaintiff David T. Hargett appeals from a judgment of the United States District Court for the Southern District of New York (Dominick L. DiCarlo, *Chief Judge of the International Court of Trade*,

sitting by designation), following a jury verdict for Defendants that resulted in dismissal of the complaint in which Hargett had alleged that he was discriminatorily terminated from his employment. On appeal, Hargett alleges that the district court erred by: (1) issuing an erroneous jury instruction on the issue of "pretext" by informing the jury that it could consider the employment positions held by others in determining whether those individuals were "similarly situated" to Hargett; (2) refusing to issue a "mixed motives" jury instruction; and (3) refusing to admit into evidence a document allegedly written by a witness who was unavailable at trial.

For the reasons that follow, we affirm.

BACKGROUND

On November 13, 1991, Hargett, an African-American male, was hired as "Vice President, Area Business Director," by National Westminster Bank USA ("National Westminster" or the "Bank") at an annual salary of $95,000. Hargett was hired away from a $70,000 per year position at Citibank, a competitor of National Westminster. Less than five months later, on April 6, 1992, National Westminster terminated Hargett's employment. The Bank's stated reason for Hargett's dismissal was that he had permitted a female stripper to perform at a monthly branch manager's meeting over which he presided, apparently in celebration of another employee's birthday and service anniversary. The meeting at which the stripper performed was held on February

11, 1992 during business hours in a conference room on National Westminster's premises.

There was evidence at trial that on at least two prior occasions, other National Westminster employees held functions where strippers performed. On one of these occasions, a male stripper appeared at a National Westminster branch after normal banking hours. The employee responsible for arranging the function, a birthday celebration for another employee, was given a verbal warning but was not terminated from her employment. On another occasion, a going-away party for an employee, a female stripper performed at a different National Westminster branch after normal banking hours. No one connected with that function was disciplined in any manner.

DISCUSSION

The essence of Hargett's complaint was that he was terminated as a result of racial discrimination, in violation of 42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1071 (1991), and of N.Y. Exec. Law § 296(a)(1).

I. The Pretext Charge

It is well settled law that a plaintiff in an employment discrimination case

> has the burden[, first] of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if

> the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection [or termination]. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981) (internal quotations and citations omitted). "In order to establish a prima facie case of racial discrimination in firing in violation . . . of Title VII, the plaintiff must show that she belongs to a protected class, that she was qualified for the position, that she was discharged, and that her discharge occurred 'in circumstances giving rise to an inference of racial discrimination.'" *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 464 (2d Cir. 1989) (quoting *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir. 1987)). Notwithstanding the three-part test for determining disparate treatment, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253, 101 S.Ct. at 1093.

In this case, Hargett made out a prima facie case of employment discrimination. Defendants then offered a non-discriminatory reason for terminating him - namely that he had allowed a female stripper to perform at a function during business hours on National Westminster premises and that he had attended the function. Hargett was therefore correctly afforded the opportunity to prove that the non-discriminatory reason was in fact pretextual.

A plaintiff in a discrimination action may establish that a reason articulated by a defendant for termination of plaintiff's employment is a pretext and that race, in fact, did play a part in the decision to terminate by proving that "similarly situated" white employees were treated more favorably than he. *See Henry v. Daytop Village, Inc.*, 42 F.3d 89, 96-97 (2d Cir. 1994). To that end, Hargett pointed to evidence that at least two other National Westminster employees hired strippers to perform at functions on bank premises, that both of these employees were white, and that neither of them was fired for his/her conduct. Despite the fact that both individuals held positions lower down in the National Westminster corporate hierarchy than he, Hargett argues that these individuals were "similarly situated" to him because they engaged in the same conduct. Hargett therefore argues that Judge DiCarlo erred in instructing the jury that it could consider employment position in determining whether certain National Westminster employees were "similarly situated" to Hargett. Judge DiCarlo instructed the jury as follows:

> It is for you to decide if the other individuals were similarly situated to the plaintiff. You may consider the positions held and the conduct in question in determining if the individuals were similarly situated. If you believe by a preponderance of the evidence that plaintiff has proven that other similarly situated employees did commit similar acts and were not terminated, then you may find defendants' reason pretextual.

In rejecting Hargett's proposed charge, which would have eliminated reference to the positions held by himself and the two other National Westminster miscreants, Judge DiCarlo stated that he believed the issue to be one of first impression, and concluded that employment position was a factor for the jury to consider along with the conduct in question in deciding whether the persons were "similarly situated."

Hargett contends that this case is not one of first impression and that the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), ruled out consideration of position within the company in deciding whether persons treated differently were "similarly situated." We disagree. The Supreme Court never addressed this question in *McDonnell*. The *McDonnell* Court stated only:

> [R]espondent must . . . be afforded a fair opportunity to

> show that petitioner's stated reason for respondent's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness . . . were nevertheless retained or rehired.

411 U.S. at 804, 93 S.Ct. at 1825. As defendants accurately note, this statement does not imply that the determination of whether acts are of "comparable seriousness" requires a myopic examination of the acts alone without regard to context or surrounding circumstances. Nothing in *McDonnell* precludes a finding that identical acts undertaken by persons of differing authority or in differing circumstances are in fact dissimilar. One can easily posit a situation where language that might be tolerated in a back office would be unacceptable at a reception desk. In a similar vein, a corporate officer who is expected to lead others might well be held to a higher standard of conduct than a lower-level functionary.

In *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976), the Supreme Court stated that:

> precise equivalence in culpability between employees is not the ultimate question: as we indicated in *McDonnell Douglas*, an allegation that other employees involved in acts

> against [the employer] of *comparable seriousness* . . . were nevertheless retained . . . is adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for terminating him was merely a pretext.

Id. at 283 n. 11, 96 S.Ct. at 2580 n. 11 (internal quotation and citation omitted). Nothing in this language precludes a finding that similar acts committed by employees occupying different levels of authority are in fact not of "comparable seriousness."

Defendants argue that:

> Plaintiff's argument is that the standards of conduct as to all actions are identical for a bank's chairman, trust officers, personnel officers, drivers, cashiers and janitors, and thus, the jury cannot make any distinction as to the standards of appropriate conduct based on the individual's level in the corporate hierarchy. This contention, which defies common sense, is an erroneous statement of law.

We agree. Requiring higher-ups to conform to a higher standard of decency is not contrary to established law and does conform with common sense. It is significant to note, in this respect, that National Westminster warned its employees, via its employee handbook ("NatWest &

You"), that "[s]enior officers and certain employees . . . may be subject to more specific procedures or standards."

We also note that the instruction permitting the jury to consider employment position did not necessarily disfavor Hargett. In support of his claim of race-based discrimination, Hargett argued at trial that Defendant Oliosi, who is white and held a superior position to Hargett, was not terminated despite having approved the stripper for the February 11, 1992 meeting. Allowing the jury to consider Oliosi's employment position could therefore have benefitted Hargett in his claim of racial discrimination.

Finally, we observe that Judge DiCarlo did not hold that, as a matter of law, the individuals with whom Hargett compared himself were not "similarly situated" to him. The district court simply instructed the jury that it could consider the positions held by those individuals in making its determination on the "similarly situated" issue.

II. The "Mixed Motives" Charge Request

Hargett also argues that the district court erred in declining to give a "mixed motives" charge. We disagree.

In an employment discrimination case, a "mixed motives" charge is proper where there is evidence to show that an employment determination was "the product of a mixture of legitimate and illegitimate motives." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247, 109 S.Ct. 1775, 1788, 104 L.Ed.2d 268 (1989). We

have previously stated:

> [I]f the plaintiff presents evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude, *and that evidence is sufficient to permit the factfinder to infer that that attitude was more likely than not a motivating factor in the employer's decision*, the jury should be instructed that if it does draw that inference the plaintiff is entitled to recover unless the employer has established by a preponderance of the evidence that the employer would have taken the same action without consideration of the impermissible factor.

Ostrowski v. Atlantic Mut. Ins. Cos., 968 F.2d 171, 182 (2d Cir. 1992) (emphasis added).

Hargett alleges that a "mixed motives" charge was required based upon two items of evidence: (1) his own testimony with respect to his conversation with Defendant Goldman, the superior officer who had hired Hargett, and (2) the testimony of an assistant vice president and branch manager of National Westminster, an employee inferior to Hargett. It is plain to us that the testimony of the latter was insufficient to require a "mixed motives" instruction. With respect to Hargett's termination, one

of National Westminster's assistant vice presidents stated only that "I thought there was a lot more to it than just - I thought there was a lot more to it than what had happened." There is no evidence to indicate that this employee was making reference to Hargett's race. Moreover, the employee had no involvement in the decision to terminate Hargett and thus the basis of whatever she "thought" could only be speculation.

Hargett's testimony regarding his pre-employment conversation with Goldman presents a closer question. Hargett testified that Goldman told him that National Westminster was "very vanilla" and that Hargett "may experience some unfair treatment based on [his] race." Goldman denied making these statements. Furthermore, Hargett himself testified that Goldman stated that he would protect Hargett should Hargett be subjected to any unfair treatment based on his race. Based on this evidence, we cannot conclude that the district court abused its discretion in finding that a "mixed motives" instruction was not required.

III. The Handwritten Document

Hargett contends that the district court erred in ruling inadmissible a handwritten letter which allegedly was written by a vice president and branch manager at National Westminster who was unavailable as a witness at trial. The letter, which was unaddressed and unsigned, in relevant part stated as follows: (1) the author suggested to Hargett that there be a stripper at the February 11, 1992 function; (2) Hargett

responded that because there would be mixed company at the meeting, the female managers should be contacted for permission; (3) the author contacted these managers, as well as other female visitors, and obtained their permission to proceed with the stripper; (4) the stripper arrived at the meeting clothed in a French maid's outfit, performed for approximately ten minutes, and was left wearing only a bikini-type outfit; (5) during the course of the stripper's performance, all of the women in attendance left; (6) the stripper then left and the meeting continued until approximately 6:30 p.m., at which time everyone left; and (7) the author personally paid $80.00 for the stripper and although he expected to be reimbursed by the other managers, he subsequently forgot to collect from them.

Hargett argues that the letter should have been admitted as an exception to the hearsay rule, under Federal Rule of Evidence 803(6). That rule permits the admission of hearsay evidence that is in the form of

> [a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or

> data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph included business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Fed.R.Evid. 803(6).

Alternatively, Hargett argues that the letter should have been admitted pursuant to Federal Rules of Evidence 804(a) and 804(b). Rule 804(a) sets forth the definition of "unavailability of a witness." It is uncontested that the alleged author of the document was unavailable. Rule 804(b) enumerates several categories of testimony that are not excluded by the hearsay rule if the declarant is unavailable as a witness. Rule 804(b)(3) describes one such exception, in relevant part, as follows:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not

> have made the statement unless believing it to be true.

Rule 804(b)(5) describes another exception, in relevant part, as follows:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The district court refused to admit the document into evidence under either Rule 803(6) or Rule 804(b). Judge DiCarlo stated that the document was inadmissible hearsay and that Hargett had failed to establish a foundation for its admission as a business record. The determination of whether a record is sufficiently reliable to warrant its admission is within the sound discretion of the district court, *United States v. Strother*, 49 F.3d 869, 874 (2d Cir. 1995), and a district court's findings as to whether the prerequisites for admissibility have been met will not be overturned absent a finding that they are clearly erroneous, *Potamkin Cadillac Corp. v. B.R.I. Coverage*

Corp., 38 F.3d 627, 632 (2d Cir. 1994).

In this case, the district court did not abuse its discretion in refusing to admit the evidence under Rule 803(6). The district court's finding that Hargett failed to establish a foundation for the document is supported by the record and is not clearly erroneous. Oliosi, the only witness questioned about the document, testified that he did not recall the circumstances under which the document was created. Furthermore, the district court did not abuse its discretion in refusing to admit the evidence under Rule 804(b). There was no showing that the document was contrary to the author's pecuniary interest. If anything, the language of the document would seem to be self-serving. Finally, the interests of justice were not frustrated by the district court's refusal to admit the document which contained little information not already in the record.

CONCLUSION

For the foregoing reasons, the judgment of the district court is hereby affirmed.

APPENDIX B - JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED FEBRUARY 14, 1995

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 93-4450 (DLD)

DAVID T. HARGETT,

Plaintiff,

v.

NATIONAL WESTMINSTER BANK, USA, ROGER GOLDMAN AND GORDON OLIOSI,

Defendants.

JUDGMENT

A Jury Trial before the Honorable DOMINICK L. DiCARLO, United States District Judge, having begun on January 30, 1995, and at the conclusion of the trial the jury having answered the attached verdict form, and the jury in so doing having returned a verdict in favor of defendants, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

DATED: NEW YORK, NEW YORK
February 10, 1995

_____s/_____
Clerk

By:_____s/_____
Deputy Clerk

APPROVED:

_____
U.S.D.J.

APPENDIX C - EXCERPTS FROM MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JANUARY 7, 1994

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 91-4488 (ILG)

CELIA HENRY,

Plaintiff,

v.

DAYTOP VILLAGE, INC.,

Defendant.

MEMORANDUM AND ORDER

This is a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 seeking an order dismissing plaintiff's complaint for employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* and 42 U.S.C. § 1981. For the following reasons, the motion is granted.

. . . . .

In *Mazzella v. RCA Global Communications, Inc.*, 642 F.Supp. 1531, 1546-47 (S.D.N.Y. 1986), *aff'd*, 814 F.2d 653 (2d Cir. 1987), the court outlined the relevant legal principles to be applied when comparing employees in a Title VII context:

> [F]or evidence relating to other employees to be relevant, those employees must be situated similarly to plaintiff. Employees are not "similarly situated" merely because their conduct might be analogized. Rather, in order to be similarly situated, other employees must have reported to the same supervisor as the plaintiff, must have been subject to the same standards governing performance evaluation and discipline, and must have engaged in conduct similar to the plaintiff's, without such differentiating or mitigating circumstances that would distinguish their conduct or the appropriate discipline for it.

The inquiry, therefore, is twofold: (i) did the plaintiff possess the same occupational status as the other non-minority employees (*i.e.*, same supervisor, same standards governing performance evaluation and discipline); and (ii) did the non-minority employees engage in conduct similar to the plaintiff's "without such differentiating or mitigating circumstances that would distinguish their conduct."

. . . . .

CONCLUSION

For the foregoing reasons, defendant's motion is granted.

SO ORDERED.

Dated: Brooklyn, New York
January 7, 1994

s/
I. Leo Glasser, U.S.D.J.

(2)

Supreme Court, U.S.
FILED
JUL 25 1996
CLERK

No. 95-2071

In The

Supreme Court of the United States

October Term, 1995

DAVID HARGETT,

Petitioner,

vs.

NATIONAL WESTMINSTER BANK, USA, GORDON OLIOSI and ROGER GOLDMAN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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COUNTER STATEMENT OF THE QUESTIONS PRESENTED

1. Does there exist a conflict among the decisions of the United States Courts of Appeals on the issue whether a jury in an employment discrimination action may consider the relative positions within an organization of individuals to whom a plaintiff contends he is "similarly situated" when deciding if the reason proffered by his employer for his termination was pretextual?

2. Should this Court exercise its discretionary jurisdiction to hear the issue whether the trial and appellate courts erred in holding that a *Price Waterhouse* mixed motive jury charge was not appropriate given the evidence presented, where there is no conflict among the United States Courts of Appeals on the law as stated by the lower courts?

STATEMENT PURSUANT TO RULE 29(6)

On May 1, 1996, National Westminster Bank, USA ("NatWest") became a wholly-owned subsidiary of Shawmut New York Corporation ("Shawmut"). At that time, NatWest merged with Fleet Bank of New York, National Association and is presently doing business as Fleet Bank, National Association. Shawmut is a wholly-owned subsidiary of Fleet Financial Group, Inc.

TABLE OF CONTENTS

	Page
Counter Statement of the Questions Presented	i
Statement Pursuant to Rule 29(6)	ii
Table of Contents	iii
Table of Citations	iv
Summary of Argument	1
Counter Statement of the Case	3
Reasons for Denying the Writ	7
I. There Exists No Conflict Among the United States Courts of Appeals on the Issues Raised in the Petition.	7
II. The Courts Below Did Not Commit Reversible Error.	9
A. A Jury May Properly Consider the Employment Positions of Others in Determining Whether They Are "Similarly Situated" to Plaintiff	10
B. The District Court Properly Instructed the Jury as to Petitioner's Burden of Proof	19
Conclusion	25

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520 (2d Cir.), *cert. denied*, 506 U.S. 965 (1992) 10

Beshears v. Asbill, 930 F.2d 1348 (8th Cir. 1991) 19, 20

Boner v. Board of Commissioners, 674 F.2d 693 (8th Cir. 1982) 17

DeBardeleben v. United States, 469 U.S. 1028 (1984) .. 9

Harvey v. Anheuser-Busch, Inc., 38 F.3d 968 (8th Cir. 1994) 13, 15, 16, 17

Haskins v. Virginia, 484 U.S. 1037 (1988) 9

Henry v. Daytop Village, Inc., 42 F.3d 89 (2d Cir. 1994) 11, 13, 17, 20

Johnson v. Palma, 931 F.2d 203 (2d Cir. 1991) 10

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 9

Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1980) 24

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 10, 11, 12, 24

Contents

Page

Ostrowski v. Atlantic Mutual Ins. Cos., 968 F.2d 171 (2d Cir. 1992) 19, 20, 21, 22

Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796 (6th Cir. 1994) 11, 13, 14, 15, 17

Price Waterhouse v. Hopkins, 490 U.S. 228 (1984) ..... i, 2, 3, 6, 19, 20, 21, 24

Radabaugh v. Zip Feed Mills, Inc., 997 F.2d 444 (8th Cir. 1993) 19

St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) ... 10, 18

Talley v. United States Postal Serv., 720 F.2d 505 (8th Cir. 1983), *cert. denied*, 466 U.S. 952 (1984) 13, 15, 17

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 10, 11, 12

Tyler v. Bethlehem Steel Corp., 958 F.2d 1176 (2d Cir.), *cert. denied*, 506 U.S. 826 (1992) 19, 20, 22

United States Postal Serv. v. Aikens, 460 U.S. 711 (1983) 18

Statutes Cited:

42 U.S.C. § 1981 ..... 1, 5, 10

N.Y. Exec. Law § 296(1)(a) (McKinney 1993) 5, 10

Contents

Page

Rule Cited:

Supreme Court Rule 10 ..... 7, 8

Respondents National Westminster Bank, USA ("NatWest" or the "Bank"), Gordon Oliosi and Roger Goldman request that the Court deny the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit which affirmed the judgment of the United States District Court for the Southern District of New York dismissing the complaint after a jury trial.

SUMMARY OF ARGUMENT

Petitioner, a high-ranking Vice President at the Bank, instituted this action alleging that his termination resulted from racial discrimination in violation of 42 U.S.C. § 1981 and the New York Executive Law.[1] The jury returned a verdict in which it found that petitioner failed to prove that respondents had intentionally discriminated against him based on his race when he was terminated after it came to senior management's attention that a stripteaser had performed at an afternoon business meeting presided over by him. Indeed, petitioner was discharged by the very same executive of NatWest — his supervisor, respondent Oliosi — who had hired him just six months earlier. The district court entered judgment dismissing the complaint against all respondents on February 14, 1995. Petitioner then appealed to the Second Circuit.

Petitioner argued on appeal that the district court erred (a) when it issued a jury instruction on the issue of "pretext" that allowed the jury to consider the positions held by other, lower-ranking employees in determining whether they were "similarly situated" to petitioner; and (b) when it refused to issue a "mixed motive," burden-shifting charge consistent with this Court's

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1. Petitioner also asserted three pendent state law claims, which were dismissed by the trial court prior to submission to the jury.

decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1984).[2]

Petitioner contended with regard to the "pretext" issue that his white supervisor (a Senior Vice President who allegedly was aware that a woman wearing a "bathing suit" was to serve cake at petitioner's meeting) and two lower-level white branch managers (who were present at after-hours parties on the Bank's premises at which such "dancers" appeared) were "similarly situated" to him. He assigned as error the fact that the court's charge permitted the jury to consider these other employees' positions in the corporate hierarchy in determining whether they were "similarly situated" to him.

With regard to the "mixed motive" charge, petitioner asserted on appeal that the evidence proffered by him of two comments allegedly made by respondent Goldman during petitioner's preemployment interview (that NatWest was a "very vanilla" organization and that Mr. Goldman would protect petitioner from any unfair treatment he might experience based on his race) required the *Price Waterhouse* charge. Petitioner argued that the district court had abused its discretion by refusing to include the charge in its instructions to the jury.

The Second Circuit affirmed the judgment in all respects. This petition for a writ of certiorari followed.

Petitioner simply errs when he contends that the writ should be issued because there exists an alleged "split" among the United States Courts of Appeals on the issue of the meaning of "similarly situated in employment discrimination cases."

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2. Petitioner also assigned as error the district court's refusal to admit into evidence a document allegedly written by a witness who was unavailable at trial. Because petitioner has not requested that the Court issue a writ on the issue of this evidentiary ruling, it will not be further addressed herein.

Further, he fails to state any basis for granting the petition with respect to the alleged error concerning the mixed motive charge other than his apparent disagreement with the district court's application of the rule of law enunciated in *Price Waterhouse v. Hopkins* to the evidence presented at trial.

Because the decisions of the United States Courts of Appeals, including the Second Circuit here, have been consistent on the definition of "similarly situated" and because the trial court properly declined to instruct the jury on the "mixed motive" issue, the petition for a writ of certiorari should be denied.

COUNTER STATEMENT OF THE CASE

Petitioner, a black male, was hired away from an officer-level position at Citibank by respondents Oliosi and Goldman to be a Vice President with NatWest on November 13, 1991 at a salary of $95,000. (Trial Transcript 83:1-14; 94:21-95:3; 96:6-21; 98:10-14; 247:10-14.[3]) He was assigned to NatWest's Community Banking Group (its branch bank network) as "Area Director" of the Manhattan Central area, one of the most prestigious geographic areas at NatWest. (Tr. 98:15-99:9.) Managers of bank branches, some of whom were themselves Vice Presidents, reported to him in his capacity as Area Director. (Tr. 606:10-20; 621:9-25.)

The events concerning petitioner's discharge — which was evidently accepted by the jury in finding for the defendants — are as follows:

On February 11, 1992, petitioner allowed a female "entertainer" to perform a striptease act at a monthly Branch

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3. Cited pages of the Trial Transcript are hereinafter referred to as "Tr."

Managers' meeting (the "February 11 Meeting"). The meeting was presided over by petitioner in the midst of the workday in a NatWest conference room and attended by petitioner's subordinates and guest employees. (Tr. 606:21-610:11; 622:12-629:4; 703:11-706:15; 718:21-719:25; 737:16-740:21.) At the conclusion of the performance, the "entertainer" was wearing only a black lace-type brassiere and a "G-string." (Tr. 609:17-19; 627:14-20; 706:10-15; 719:24-25; 739:20-24.)

It was not until a few weeks later that the event came to the attention of NatWest management when an anonymous letter of protest was sent to the Vice President of Human Resources for the Community Banking Group, Barbara Hahn. (Tr. 463:6-12; 762:23-763:11-18.) Separate investigations into the event were conducted by Mr. Oliosi and, at the request of the Chairman and Chief Executive of NatWest, an independent investigation was undertaken by a Senior Vice President of Human Resources. (Tr. 465:20-466:2; 466:24-467:5; 493:16-494:20; 630:23-635:5; 707:25-708:8; 773:11-774:10, 20-24.) Both investigations confirmed that a "dancer" had performed a striptease at the February 11 Meeting. Although present throughout, petitioner made no effort to stop this "performance." (Tr. 611:1-5.) After the stripper departed, petitioner continued the business meeting. (Tr. 612:19-613:22; 635:13-636:8; 774:4-10, 20-24.)

Following his investigation, Mr. Oliosi decided with the approval of his superior, Mr. Goldman, Executive Vice President and Corporate Head of the Community Banking Group, that due to petitioner's blatant violation of numerous Bank policies, the offensive nature of this display and petitioner's utter lack of professional judgment, NatWest would terminate petitioner's employment effective April 6, 1992. (Tr. 153:15-23; 154:10-20; 238:20-25.)

This action was commenced on or about June 30, 1993. The claims presented to the jury alleged that petitioner was wrongfully discharged on the basis of his race in violation of 42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) ("Section 1981"), and N.Y. Exec. Law § 296(1)(a) (McKinney 1993) ("New York Human Rights Law").

Petitioner's theory on the discrimination claims was that "similarly situated" white employees had committed comparable transgressions and received less severe punishment than he. Specifically, petitioner offered evidence that a female Branch Manager, Anne St. Paul, who was an Assistant Vice President, had permitted a birthday party for one of the bank tellers to take place at her branch after it had closed for the day. (Tr. 358:19-359:3; 364:13-20.) At the party, a male "Chippendale"-type dancer performed. (Tr. 366:21-367:19.) After petitioner's termination, Ms. St. Paul advised Mr. Oliosi of this party that had occurred at her branch. (Tr. 372:20-373:3.) She was ultimately issued a verbal warning. (Tr. 373:12-23.)

The second incident involved another Branch Manager and Assistant Vice President, Robert Bisher, whose subordinates hired a belly dancer to perform as a surprise for him after his branch had closed on his last day prior to a transfer to a new location. (Tr. 311:22-313:1.) He received no reprimand from the Bank as a result of being "victimized" by this going-away joke.[4] (Tr. 314:19-20; 323:14-15.) Finally, petitioner testified at trial that he sent a note to Mr. Oliosi requesting approval to have a woman in a bathing suit serve cake at the February 11 Meeting. (Tr. 214:5-216:12.) Mr. Oliosi (who denied ever receiving the note or approving the dancer's appearance) was not disciplined in connection with the February 11 Meeting. (Tr. 588:2-7.)

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4. Ms. Hahn testified that she only learned about this incident at the trial in this action. (Tr. 473:23-474:4.)

Following a jury verdict and judgment entered dismissing the complaint against all respondents, petitioner, on March 8, 1995, appealed to the Second Circuit raising, *inter alia,* the following issues:

1. Whether the district court erred by instructing the jury that in determining whether "similarly situated" white employees were treated more favorably than petitioner, the jury may consider the positions in the corporate structure of such white employees relative to that of petitioner in addition to the alleged transgressions in which the white individuals were involved.

2. Whether the district court erred, in the absence of any evidence directly reflecting an unlawful discriminatory motive, by refusing to instruct the jury that the burden of proof should be apportioned in accordance with the "mixed motive" analysis articulated in this Court's *Price Waterhouse v. Hopkins* decision.

After hearing argument, the Second Circuit panel affirmed the judgment stating, on the first issue, that it agreed with respondents that "requiring higher ups to conform to a higher standard of decency is not contrary to established law and does conform to common sense." The court further found that since petitioner had offered evidence comparing himself with employees in higher as well as lower positions than he, the instruction did not necessarily disfavor him and was, therefore, not prejudicial.

With respect to the error assigned by petitioner on the second issue, the court found that because the only evidence offered by petitioner in support of the requested charge was the alleged preemployment conversation with Mr. Goldman in which he purportedly stated that NatWest was "very vanilla" and that he would protect the petitioner from any unfair treatment he

might experience at the Bank, it could not conclude that the district court had abused its discretion when it refused to include a "mixed motive" instruction in its charge to the jury.

The petitioner seeks this Court's review on a writ of certiorari of these same two issues.

REASONS FOR DENYING THE WRIT

Although the petition states that the writ should be granted "to resolve a split between the Federal Circuit Courts of Appeals on the important issue of determining when employees are 'similarly situated,' " there is *no* conflict among the circuit courts on either issue raised in the petition. Petitioner has stated no compelling reason why a writ of certiorari should be granted. He merely reargues the same factual matters which the jury decided against him and makes the identical legal arguments that were rejected by the two lower courts.

Respondents respectfully request that the Court decline to exercise jurisdiction and deny the petition for a writ of certiorari.

I

THERE EXISTS NO CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS ON THE ISSUES RAISED IN THE PETITION.

Rule 10 of the Rules of the Supreme Court of the United States ("Supreme Court Rules") makes clear that petitions for a writ of certiorari are granted only under the most compelling circumstances, as follows:

> Review on a writ of certiorari is *not a matter of right*, but of judicial discretion. A

> petition for a writ of certiorari will be granted *only for compelling reasons.*
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> A petition for a writ of certiorari *is rarely granted* when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Supreme Court Rules, Rule 10 (emphasis added).

One circumstance enumerated in the Supreme Court Rules in which a petition for a writ may be granted is where "a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter." *Id.* Although petitioner contends that a conflict exists with regard to the pretext issue, the decisions he cites reveal no such conflict.

Indeed, the courts in a number of those decisions *did* consider the employment positions held by others allegedly "similarly situated" to the plaintiffs therein. The courts in the remaining decisions cited by petitioner did not address the positions held by others at all. Our research has not revealed any decision holding that the positions of other employees with whom a plaintiff compares herself or himself may *not* be considered in determining whether they are "similarly situated" to that plaintiff. Thus, there is no conflict among the courts of appeals on the first issue raised by petitioner.

With regard to the second issue of whether petitioner was entitled to a "mixed motive" charge, he does not even assert that there exists a conflict among the courts of appeals warranting

this Court's exercise of its discretionary jurisdiction, much less cite decisions that would create a conflict. Indeed, petitioner has failed to allege or establish *any* jurisdictional basis for this Court's review of this aspect of the district court's jury charge. Petitions for a writ of certiorari have been consistently denied in circumstances much more compelling than this, such as where a conflict *does* exist among the courts of appeals but the Court finds the issues not sufficiently "important" to issue a writ. *See, e.g., Haskins v. Virginia*, 484 U.S. 1037 (1988); *DeBardeleben v. United States*, 469 U.S. 1028 (1984); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392 (1923). Where, as here, the courts below applied a properly stated rule of law to the fact-specific case before it, further review by this Court is not warranted.

Because the petition fails to establish a basis for this Court's jurisdiction to issue a writ of certiorari, the petition should be denied in its entirety.

II

THE COURTS BELOW DID NOT COMMIT REVERSIBLE ERROR.

Notwithstanding the fact that petitioner has utterly failed to establish any basis to justify this Court's exercise of its discretion to grant the petition, there exists no substantive ground for reversing the decision of the Second Circuit or dismissing the judgment of the district court. Because the courts below acted properly in all respects, the petition should also be denied.

A. A Jury May Properly Consider the Employment Positions of Others in Determining Whether They Are "Similarly Situated" to Plaintiff

The Second Circuit found that the district court properly charged the jury to evaluate the evidence under the three-tier standard enunciated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (the "*McDonnell Douglas/Burdine* standard").

This standard, applicable to petitioner's claims under both Section 1981 and the New York Human Rights Law, requires that a petitioner first prove by a preponderance of the evidence the following required elements to make out a prima facie case: (1) he is a member of a class protected by the statutes; (2) he was denied equal terms and conditions of employment as were white persons; and (3) the reasons for the denial of terms and conditions were based on his race. *Id. See also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993); *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520 (2d Cir.), *cert. denied*, 506 U.S. 965 (1992); *Johnson v. Palma*, 931 F.2d 203 (2d Cir. 1991).

If the plaintiff proves each of the required elements by a preponderance of the evidence, the defendant must then merely state a legitimate, nondiscriminatory reason for its conduct toward plaintiff. Upon presentation of evidence by the defendant of legitimate, nondiscriminatory reasons for its actions, the plaintiff must then prove by a preponderance of the evidence that the reasons articulated by the defendant are a pretext and that race did play a determining role in the decision of which the plaintiff complains. If the plaintiff fails to prove by a preponderance of the evidence that the defendant's articulated reasons for its actions were a pretext for intentional discrimination, then judgment must be entered for the defendant. *Id.*

One manner in which a minority plaintiff may establish pretext is to prove that "similarly situated" white employees were treated more favorably than he or she. *See Henry v. Daytop Village, Inc.*, 42 F.3d 89 (2d Cir. 1994); *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796 (6th Cir. 1994). Petitioner took issue on appeal with the trial court's instruction on how the jury should evaluate whether other employees were "similarly situated" to him.

After charging the jury to evaluate the evidence under the three-tier *McDonnell Douglas/Burdine* standard, the district court explained the meaning of "similarly situated" relating to the issue of "pretext," as follows:

> It is for you to decide if the other individuals were similarly situated to the plaintiff. You may consider the *positions held and the conduct in question* in determining if the individuals were similarly situated. If you believe by a preponderance of the evidence that plaintiff has proven that other similarly situated employees did commit similar acts and were not terminated, then you may find defendants' reason pretextual.

(Tr. 1119:9-16) (emphasis added).

Petitioner assigned as error the fact that the district court permitted the jury to consider both (a) the *positions* held by the individuals he claimed were "similarly situated" to him; *and* (b) the *conduct* allegedly committed by them, in determining whether they were, in fact, "similarly situated" to the petitioner. His position is that it was error for the trial court to advise the jury that employees' job titles, positions or responsibilities are relevant in determining whether they might be "similarly

situated." Rather, petitioner contended that the jury could only consider the acts of the employees in deciding that issue. Petitioner's argument is that the standards of conduct as to all actions are identical for a bank's chairman, trust officers, personnel officers, drivers, cashiers and janitors, and thus, the jury cannot make any distinction as to the standards of appropriate conduct based on the individual's level in the corporate hierarchy.

As the Second Circuit properly found, this contention, which defies common sense, is an erroneous statement of the law. Moreover, the decisions cited by petitioner as purportedly creating a "split among the federal circuit courts" either support the proposition that an employee's job title may be properly considered on this issue or do not address the issue at all.

For example, petitioner's reliance on the United States Supreme Court decision in *McDonnell Douglas v. Green* for the proposition that the positions of the allegedly "similarly situated" employees may not be considered by the jury is misplaced and ignores the subsequent decisions of the United States Courts of Appeals construing *McDonnell Douglas* on the issue. In *McDonnell Douglas*, this Court never even addressed the question of whether other employees' positions should be considered when determining whether they are "similarly situated" to the plaintiff. Rather, in discussing the meaning of "pretext," this Court simply stated that it would have been "especially relevant" in establishing pretext if white employees involved in acts of "comparable seriousness" were treated differently. This statement does not imply that only acts of "comparable seriousness" may permissibly be considered, or that it would be erroneous for a jury to consider the various employees' positions and grades when considering the issue of "similarly situated" employees.

Moreover, as the subsequent decisions of the courts of appeals discussed below — including those cited by petitioner — make clear, it would be error *not* to instruct the jury that the relative positions of the employees in question should be considered in determining whether they were "similarly situated" to the petitioner.

The decisions are uniform in finding that a consideration of the relative positions of a plaintiff and those with whom he or she compares himself or herself is entirely appropriate in a disparate treatment discrimination action. *See, e.g., Henry*, 42 F.3d at 96; *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 972 (8th Cir. 1994); *Pierce*, 40 F.3d at 802; *Talley v. United States Postal Serv.*, 720 F.2d 505, 507 (8th Cir. 1983), *cert. denied*, 466 U.S. 952 (1984). In all of these decisions, the courts relied on the difference in the positions or rank of other employees when determining whether they were "similarly situated" to the plaintiff. Indeed, the very term "similarly situated" implies rank as well as the circumstances in which the employees are found.

In *Henry*, a disparate treatment race and gender discrimination action, the plaintiff alleged that the "similarly situated" white and male employees who had committed misconduct similar to that of which she, a black female, was accused, were disciplined less harshly than she. 42 F.3d at 94. In upholding the district court's entry of summary judgment against plaintiff on the issue, the Second Circuit held that eight of the ten employees were *not* "similarly situated" to the petitioner because they *either* held a "different occupational status" *or* engaged in conduct "different in kind" to that attributed to the petitioner.[5] 42 F.3d at 97. The Second Circuit in *Henry* made it clear that an employee who is not at the same

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5. The remaining two employees, while arguably "similarly situated," received the same disciplinary sanction as plaintiff. *Henry*, 42 F.3d at 97.

occupational status or level may not be "similarly situated" to the plaintiff, given the facts of the case.

Likewise, in *Pierce*, a "reverse" sex discrimination action, the Sixth Circuit considered the relative positions of the male and female employees at issue in determining that they were not "similarly situated" to the plaintiff, explaining, as follows:

> In order to show that he was "similarly situated" to [the female employee, the plaintiff] was required to prove that all of the relevant aspects of his employment situation were "nearly identical" to those of [the female employee's] employment situation. The following distinctions between [the female employee and the plaintiff] are undisputed: [the plaintiff] was a *supervisor* and [the female employee] was not; [the plaintiff] had *responsibility over three offices*, whereas [the female employee] was an "office administrator" with no supervisory control over any other employees; [the plaintiff] *evaluated employees*, including [the female employee] while [she] evaluated no one; and unlike [the female employee, the plaintiff] attended agency group meetings and was responsible for enforcement of the company's sexual harassment policy.
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> Under these circumstances, the relevant aspects of his employment are not, as [the plaintiff] claims, "nearly identical" to

> [the female employee's] employment. Thus [the plaintiff] and [the female employee] are not "similarly-situated" employees. Because [the plaintiff] has presented no other evidence of disparate treatment of employees who are truly similarly situated, he has failed to satisfy the elements of his prima facie case. Accordingly, summary judgment was proper on [the plaintiff's] claim for reverse discrimination.

Pierce, 40 F.3d at 802, 804 (citation omitted) (emphasis added).

Indeed, even in the *Harvey v. Anheuser-Busch, Inc.* and *Talley v. United States Postal Service* decisions relied on by petitioner as creating a "split" among the circuit courts, the Eighth Circuit held that disparity in discipline was warranted given both the differences in the positions held by the plaintiffs and the persons with whom they compared themselves, *and* the transgressions committed by them.

In *Harvey*, a white security officer and his black sergeant came upon an apparently unconscious man while on patrol. 38 F.3d at 970. The black sergeant advised the white officer that he need not take any action and that the sergeant would report the incident to the police. *Id.* The sergeant neglected to do so, was suspended and ultimately fired. *Id.* at 971. The white officer was not terminated. The black sergeant brought suit claiming discrimination based on the disparity in the disciplinary treatment of the two individuals arising from the same failure to report. On appeal of summary judgment entered in favor of the employer, the Eighth Circuit affirmed. The court held that in view of the difference in the positions of the two individuals

along with the culpable conduct of each, they were not "similarly situated," as follows:

> Instances of disparate treatment can support a claim of pretext, but [the black sergeant] has the burden of proving that he and the disparately treated whites were " 'similarly situated *in all relevant respects*.' "
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> [The black sergeant] argues that he presented evidence of pretext because [the white officer] was not terminated, while [the black sergeant] was suspended seven days and then discharged. We disagree. [The white officer] was [the black sergeant's] *subordinate*. [The black sergeant] instructed [the white officer] not to stop to assist the man lying on the sidewalk and later forgot to call the police. In these circumstances, *disparity in discipline was clearly warranted.*
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> Thus [the white officer] and [the black sergeant] were not similarly situated for purposes of proving pretext.

Harvey, 38 F.3d 972 (citations omitted) (emphasis added). In this decision relied upon by petitioner, the court made it perfectly clear that both the varying positions as well as the offenses committed *were* to be considered in determining that the two individuals were not "similarly situated."

The Eighth Circuit reached the same result in the earlier *Talley* decision where it found that the plaintiff — a temporary, casual employee — was not "similarly situated" to the "career employees" with whom she compared herself based on the disparity in their employment positions *and* the fact that none of the career employees had repeatedly committed the same serious offense as did the plaintiff. 720 F.2d at 507.

Similarly, the Eighth Circuit decision in *Boner v. Board of Commissioners*, 674 F.2d 693 (8th Cir. 1982), fails to create the "split" in the federal circuit courts that petitioner alleges exists. In *Boner*, the court held that an employee with whom plaintiff compared himself was not "similarly situated" to him where (a) the offenses on which discipline was based were not comparable; and (b) the employee was qualified to perform his job competently and plaintiff was not. Although the court noted that the white employee with whom the plaintiff compared himself was a managerial employee and plaintiff was not, it did not comment on whether the difference in employment positions was relevant to its determination that the two were not "similarly situated."

In addition, the trial court here did not rule — as did the *Henry, Pierce* and *Harvey* trial courts — that as a matter of law the individuals with whom petitioner compared himself were not "similarly situated" to him. It merely instructed the jury that it may *consider* the positions held as well as the conduct in question in determining whether the other individuals were "similarly situated" to the petitioner. Not only did this instruction follow the authorities cited, it is consistent with logic and ordinary human experience that the higher an official is in the corporate hierarchy, the more stringent are the standards of conduct to which he is held. Simply put, the chief executive's language and behavior is not measured by the standards of the loading dock. Moreover, as the Second Circuit aptly noted,

because petitioner offered evidence that both an individual above him in the Bank's hierarchy (Mr. Oliosi) and individuals below him (Ms. St. Paul and Mr. Bisher) were not terminated after allegedly engaging in conduct comparable to his, the instruction did not disfavor petitioner. Given the fact that determinations of discriminatory intent cannot be made by adherence to strict formulas and that common sense is the best guide for a jury in attempting to find motivation, instructions to consider a multitude of facts (such as those by the trial court here) are all the more reasonable and appropriate. *See St. Mary's Honor Ctr.*, 509 U.S. at 517-18 (citing *United States Postal Serv. v. Aikens*, 460 U.S. 711, 715 (1983)).

Finally, the evidence adduced by the Bank established that, as a factual matter, under the Bank's policy, different levels of employees were held to different standards of conduct, thus making the district court's instruction entirely proper. Specifically, the testimony of a Senior Vice President of Human Resources and NatWest's employee handbook confirmed that it was NatWest's policy to hold senior officers, such as petitioner, to a higher standard of conduct than other lower-level employees. (Tr. 453:9-24.)

In view of this evidence and controlling authorities, the Second Circuit properly found that the district court did not err when it instructed the jury that it could permissibly consider the relative positions of the employees with whom petitioner compared himself when determining whether they were "similarly situated" to petitioner. Our research has revealed no decision holding or even intimating that the employment positions of individuals with whom a plaintiff contends he or she is "similarly situated" may not be considered in making that determination. The petition based on this argument should be denied.

B. The District Court Properly Instructed the Jury as to Petitioner's Burden of Proof

Petitioner does not take issue with the lower courts' statement of the law as enunciated in *Price Waterhouse* and its progeny. Rather, he objects to the manner in which the courts applied the law in view of the evidence offered by him at trial. Petitioner contends that the district court erred in refusing to give the burden-shifting "mixed motive" charge described in *Price Waterhouse v. Hopkins*, 490 U.S. 228. However, such a charge would have been entirely inappropriate given the evidence adduced at trial, and the trial court properly declined to so instruct the jury.

A "*Price Waterhouse* instruction" is appropriate only where the evidence establishes that an employment decision was "the product of a mixture of legitimate and illegitimate motives." 490 U.S. at 247. In order to require a *Price Waterhouse* "mixed motive" charge, a plaintiff must introduce "evidence of conduct or statements by persons *involved in the decisionmaking process* that may be viewed as *directly reflecting the alleged discriminatory attitude*, and that evidence [must be] sufficient to permit the factfinder to infer that that [factor] was more likely than not a motivating factor in the employer's decision." *Ostrowski v. Atlantic Mutual Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992) (emphasis added); *see also Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176 (2d Cir.), *cert. denied*, 506 U.S. 826 (1992).

In such a case, the petitioner has the initial burden of establishing by some type of direct proof that the "forbidden animus" was a motivating factor in an employment decision adverse to the plaintiff. *Ostrowski*, 968 F.2d 181-82 (citing *Tyler*, 958 F.2d at 1186); *see also Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444 (8th Cir. 1993) (citing *Beshears v. Asbill*, 930 F.2d 1348, 1353 (8th Cir. 1991)). Once this is accomplished, the

burden shifts to the employer to prove that it would have made the same decision even if it had not taken the illegitimate factor into account. *Id.*

It is for the trial court to make the initial determination as to whether petitioner had presented sufficient evidence directly reflecting a discriminatory motive such that the jury could reasonably conclude that petitioner's race was at least one of the motivating factors in the defendant's employment decision. *See Ostrowski*, 968 F.2d at 181 (plaintiff entitled to burden-shifting instruction only if sufficient evidence adduced to allow trier of fact to find both forbidden and permissible motives); *see also Henry*, 42 F.3d at 96 (plaintiff must adduce more than conclusory or unsubstantiated statements for disparate treatment claim to even reach jury). Here, the trial judge correctly concluded that petitioner had not crossed the required threshold to justify a mixed motive charge.

A review of the quantum and quality of evidence adduced in the *Price Waterhouse*, *Ostrowski* and *Tyler* cases is useful in illustrating the evaluation a trial court must make in determining whether sufficient evidence "directly reflecting the alleged discriminatory attitude" exists to warrant the burden-shifting instruction of *Price Waterhouse*.

In *Price Waterhouse*, a sex discrimination case relating to a failure to promote the plaintiff to a position of partner in her firm, this Court found that certain partners who voted against the plaintiff in her partnership bid were motivated by illegitimate factors, as follows:

> There were clear signs, though, that some of the partners reacted negatively to Hopkins' personality because she was a woman. One partner described her as

> "macho"; another suggested that she "overcompensated for being a woman"; a third advised her to take "a course at charm school." . . . But it was the man who [explained the partnership's decision to Hopkins] who delivered the coup de grace: in order to improve her chances for partnership, [he] advised, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."

490 U.S. at 235.

Hence, this Court found that this blatant evidence of discriminatory motivation that was an integral part of the decision against extending a partnership offer to the plaintiff required the enunciation of a new, more onerous evidentiary standard in which the burden of persuasion shifted to the employer to show that it would have made the same decision even if it had not allowed the discriminatory factor to play a role. *Id.* at 244.

In *Ostrowski*, an Age Discrimination in Employment Act ("ADEA") action in which the plaintiff contended that he was terminated in retaliation for hiring and promoting older employees, the Second Circuit held that a *Price Waterhouse* charge was warranted. The *Ostrowski* plaintiff testified that his supervisor had stated with respect to two employees hired by plaintiff, " 'That's not the type of person that we want to hire. . . . That guy should have retired years ago,' " and " '[the employee] is not Atlantic [the employer]-type material' " and " 'should have stayed retired.' " There was also evidence that the supervisor noted those employees' ages before stating that they had no future in the company and could not contribute to it.

Finally, the supervisor complained that there were " 'no young, upcoming, promotable people [in the office due to plaintiff's] hiring practices.' " 968 F.2d at 174. Because this evidence (if believed) specifically connected age-related factors to the plaintiff's termination, the Second Circuit held that it was reversible error to fail to provide a mixed motive, burden-shifting charge to the jury.

Similarly, in *Tyler*, an ADEA plaintiff presented evidence that the memorandum recommending the plaintiff's layoff listed his age and years of service, the company had an approved category of employees it called the "Young Tiger" classification, and the company appraisals specifically referred to youth in a positive manner. *Tyler*, 958 F.2d at 1178. The Second Circuit again held that this type of evidence required the burden-shifting charge set forth in *Price Waterhouse*.

Clearly, the evidence proffered by petitioner herein did not come close to approaching this level of direct evidence of a discriminatory motive. Indeed, petitioner testified that *none* of his subordinates, peers or superiors ever made a comment to him about his race and that no one at National Westminster Bank ever harassed him or even told a racist-type joke in his presence. (*See* Tr. 74:6-75:12.) Likewise, the "evidence" cited by petitioner in support of his claim of error utterly fails to meet the required level of proof necessary to warrant the mixed motive charge.

The first purported evidence of mixed motivation identified by petitioner was his testimony concerning a statement allegedly made by respondent Goldman (which Mr. Goldman denied ever making (Tr. 902:20-903:9)) to petitioner while he was being interviewed that NatWest was "very vanilla" and that petitioner might "experience some unfair treatment based on [his] race." In

the next sentence of petitioner's testimony — tellingly omitted from the quotation in his brief — petitioner stated as follows:

> But, [Mr. Goldman] said, I will fly — I will never forget this — the aircraft carrier [*i.e.*, "air cover"] for you, in case of any unfair treatment based on race and *he assured me that I would be able to perform my duties without any adverse reactions or responses based on my origins.*

(Tr. 92:17-21) (emphasis added). Petitioner went on to testify that he was "delighted" that Mr. Goldman was "taking the first step" to hire qualified minorities and that it "made him feel great." (Tr. 93:1-5.)

Petitioner cannot possibly be heard to argue that these alleged statements indicating an affirmative action, *pro*-minority state of mind on the part of Mr. Goldman during petitioner's initial interview somehow constitute evidence that Mr. Goldman himself was unlawfully motivated when he concurred in the decision to terminate petitioner's employment six months later. If anything, even if the statements were made by Mr. Goldman, it would tend to prove that Mr. Goldman *did not* consider petitioner's race when he approved petitioner's termination. It is *not* evidence that Mr. Goldman was motivated by petitioner's race when he made that decision. In effect, petitioner has offered the exact opposite of the evidence required to support a mixed motive charge to the jury.

Given the fact that the very executives, Messrs. Oliosi and Goldman, who hired petitioner away from an officer-level position at Citibank, were the same individuals who decided to terminate his employment six months later, Mr. Goldman's alleged remarks about other unidentified persons' racial

attitudes had no probative value on the issue of their own "mixed motives."

The only other "evidence" offered by petitioner to attempt to substantiate his request for a mixed motive charge —asserted for the first time in the petition — is the alleged improper investigation by Ms. Hahn of others named in the anonymous letter reporting the stripper's appearance at petitioner's February 11 Meeting and her alleged failure to investigate the two lower-level employees present at other after-hours events at the Bank where dancers appeared.

This attempt to substantiate his request for a *Price Waterhouse* charge by offering disparate treatment evidence is completely misguided. Evidence that others were treated more favorably than petitioner, while relevant to a *McDonnell Douglas* pretext analysis, has no place in a discussion of *Price Waterhouse* mixed motivation. Such evidence is of no probative value on the issue of whether the decision to terminate petitioner's employment was the product of a mixture of legitimate and illegitimate motives as is required by *Price Waterhouse* and its progeny, because it does not establish that race was actually one of the factors considered when the decision was made to terminate petitioner's employment. Not surprisingly, the only "authority" cited by petitioner in connection with this flawed argument is *McDonnell Douglas* itself and *Lieberman v. Gant*, 630 F.2d 60 (2d Cir. 1980), which both predate *Price Waterhouse*. Needless to say, neither decision addresses mixed motivation terminations or the proper legal standard applicable in actions arising from such terminations.

In the absence of any direct evidence tending to show that petitioner's race was considered in any manner when Messrs. Oliosi and Goldman made the decision to terminate his employment, the trial court was entirely correct, and well within

its discretion, when it refused to instruct the jury on the burden-shifting analysis articulated in *Price Waterhouse*. So found the Second Circuit when it held that the district court had not abused its discretion in ruling that a mixed motive instruction was not required. Consequently, because there is no jurisdictional basis for Supreme Court review of the lower courts' application of this properly stated rule of law, the petition should be denied.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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